PP

v.

DRAGCOM SDN BHD & ORS AND OTHER CASES

HIGH COURT SABAH & SARAWAK, LABUAN
RAVINTHRAN PARAMAGURU J
[CRIMINAL APPLICATIONS NO: LBN-44-2-8-2012, LBN-44-4-8-2012 & LBN-44-3-8-2012]
12 MARCH 2013

STATUTORY INTERPRETATION: *Construction of statutes - Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLA') - 12-month period prescribed in s. 56(1) AMLA - Public Prosecutor to apply for forfeiture order of property seized under Act - Whether provision to be construed strictly - Whether time period mandatory and not permissive to safeguard against abuse of powers by enforcement authorities and Public Prosecutor*

The Public Prosecutor ('applicant') in the three cases herein applied to the High Court under s. 56(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLA') for an order of forfeiture of monies held in several bank accounts of the respondents. The applicant had frozen the accounts pursuant to s. 50(1) of the AMLA on the ground that the monies in those accounts were allegedly obtained as a result of, or in connection with, a money-laundering offence under s. 4(1)(a) of the Act. Although the respondents were not prosecuted for any offence, s. 56(1) of the AMLA allowed the applicant to apply to the High Court for an order of forfeiture of property that had been frozen or seized under the said Act if the applicant was satisfied that such property was obtained as a result of, or in connection with, an offence under s. 4(1) or a terrorism financing offence or was terrorist property. Section 56(1), however, required the application to be made before the expiration of 12 months from the date the property was frozen or seized. If no application was made, then at the expiration of the 12 months, the property was required by s. 56(3) to be released to the person from whom it was seized. In all the instant cases, the application to court for the order of forfeiture was only filed after 12 months had expired from the date the respondents' accounts were frozen.

Held (dismissing applications; ordering the monies in accounts to be released to respondents):

(1) The 12-month time period stipulated in s. 56 of the AMLA was mandatory and not permissive. It could reasonably be inferred that the aim of the 12-month time limit was to provide a safeguard

against the arbitrary use of the extensive powers granted by Parliament to the enforcement authorities and the Public Prosecutor. Without the prescribed time limit, affected parties whose properties had been seized would be subject to the sweet will of the Public Prosecutor in awaiting the final outcome of forfeiture proceedings. Therefore, the 12-month time limit had to be construed strictly. (paras 11 & 13)

(2) Section 56(3) of AMLA clearly states that if no application was made within the 12 months, the property shall be released to the person from whom it was seized. On the facts, the applications were made after the 12-month period had lapsed. The applications were therefore incompetent and the court was deprived of the power to hear them. The Public Prosecutor, or the enforcement agency in question, was obliged by law to return the property on the expiration of the 12-month period. There was no provision in the AMLA for the time period stipulated in s. 56 to be extended. (paras 13 & 14)

(3) The argument that the applications for the forfeiture order had been made within the 12 months in that they were emailed to the court interpreter in Labuan was without merit. An application was made either by filing hard copies of the cause papers at the court registry or by submitting soft copies of the same through the court's e-filing system. It was certainly not made through emailing copies to the court's interpreter. (para 15)

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4(1)(a), 44(1), (2)(b), 50(1), 51, 55, 56(1), (2), (3),
Criminal Procedure Code, s. 310
Customs Act 1967, s. 135

(Criminal Application No: LBN-44-2-8-2012 & LBN-44-4-8-2012)
For the applicant - Mohd Fareez Rahman; DPP
For the respondent - JM Martin; M/s JM Martin & Assocs

(Criminal Application No: LBN-44-3-8-2012)
For the applicant - Mohd Fareez Rahman; DPP
For the respondent - Ram Singh; M/s Ram Singh & Co

Reported by Ashok Kumar

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] The three instant cases are applications by the Public Prosecutor under s. 56(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613) (hereinafter referred to as 'AMLA'). As all the three applications were heard at the same time and the preliminary issue of law that arose was the same, I shall give a joint judgment in respect of all three cases. The common preliminary issue of law that arose in all three cases was whether the court has jurisdiction to entertain an application under s. 56(1) of the AMLA if it is filed 12 months or more after the seizure or freezing order.

Background Facts

[2] In Criminal Application No: LBN 44-2-8-2012 (*PP v. Dragcom Sdn Bhd & Ors*), the Public Prosecutor has applied to forfeit monies held in fifteen bank accounts of the four respondents. The said bank accounts and monies held in the said accounts are listed in paras. (a) to (q) of the notice of motion. The application was filed on 23 August 2012. The above bank accounts were frozen by the order of the Public Prosecutor under s. 50(1) of the AMLA on 19 August 2011. The affidavit in support was affirmed on 16 August 2012 but the application was filed in court only on 23 August 2012.

[3] In Criminal Application No: LBN 44-4-8-2012 (*PP v. Kropkop CSC Enterprise & Anor*), the Public Prosecutor has applied to forfeit monies held in nine bank accounts of the two respondents. The said bank accounts and monies held in the said accounts are listed in paras. 1(a) to (i) of the notice of motion. The above bank accounts were frozen by the order of the Public Prosecutor under s. 50(1) of the AMLA on 19 August 2011. The affidavit in support was affirmed on 17 August 2012 but the application was filed in court only on 23 August 2012.

[4] In Criminal Application LBN No: 44-3-8-2012 (*PP v. Bee Guan Hang Sdn Bhd & Ors*), the Public Prosecutor applied to forfeit monies held in 13 bank accounts of the three respondents. The said bank accounts and monies held in the said accounts are listed in paras. 1(a) to (n) of the notice of motion. The above bank accounts were frozen by the order of the Public Prosecutor under s. 50(1) of the AMLA on 19 August 2011. In this case, the enforcement agency of the customs department also issued an order to freeze the properties of the

respondents on 23 May 2011 under s. 44(1) of the AMLA. The affidavit in support was affirmed on 16 August 2012 but the application was filed in court only on 23 August 2012.

Ground Of The Application

[5] The common ground of the applications in all the above cases is that the monies in question had been obtained as a result of or in connection with a money laundering offence under s. 4(1)(a) of the AMLA. The respondents in all the three cases were investigated for a smuggling offence under s. 135 of the Customs Act 1967. This means that assuming the respondents were charged for money laundering under s. 4(1)(a) of the AMLA, smuggling would have been what is commonly known as the "predicate" offence.

Freezing And Seizure Provisions Under AMLA

[6] Sections 44, 50 and 51 are provisions under AMLA that empower the relevant authority to effect the initial freezing or seizure of the property in question. These provisions are found in Part IV of AMLA which is titled "Freezing, Seizure and Forfeiture". The sub-heading to s. 44 of the AMLA is "Freezing of property". The sub-heading to ss. 50 and 51 reads "Seizure of movable property in financial institution and seizure of immovable property" respectively. The power under s. 44 of AMLA is exercisable by an enforcement agency whereas the power under s. 50 and s. 51 of the AMLA is exercisable by the Public Prosecutor. The effect of such exercise, whether it is called a "seizure" or "a freezing order", is similar under all the above provisions, ie, it prevents the disposal of the property. In addition, under s. 44(2)(b), the relevant officer can be even empowered to take custody of the property if the circumstances so require.

Forfeiture Under s. 56 Of The AMLA

[7] Under the scheme of the AMLA there are two types of forfeiture, ie, forfeiture of property upon prosecution for an offence under s. 55 and forfeiture of property where there is no prosecution under s. 56. In the instant cases, there were no prosecution and the Public Prosecutor proceeded under s. 56 of the AMLA which reads as follows:

> **56. Forfeiture of property where there is no prosecution**
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> (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor *may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if* he is

satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:

(a) that the property is the subject-matter of or was used in the commission of an offence under sub-section 4(1) or a terrorism financing offence or is terrorist property; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) *shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.*

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings. (emphasis added)

Preliminary Question Of Law

[8] The respondents in Criminal Application No: LBN 44-2-8-2012 and Criminal Application LBN No: 44-4-8-2012 were represented by Mr JM Martin whereas the respondents in Criminal Application No: LBN 44-3-8-2012 were represented by Mr Ram Singh. The Public Prosecutor was represented by DPP Mohd Fareez bin Rahman. At the outset of the hearing, both counsel raised an important preliminary point of law which merited serious consideration. They submitted that the applications under s. 56 of the AMLA are bad because such applications were made 12 months after the seizure or freezing order. Learned DPP's response to this argument can be summarised as follows. The court has the inherent power not to strike out an application on a technicality such as delay. He cited a number of civil procedure authorities to support his argument. He also cited, by way of analogy, provisions of the Criminal Procedure Code which empowers the court to grant the extension of time in cases of delay in filing notice of appeal and petition of appeal. Finally, he submitted that the AMLA does not provide that an application under s. 56 should be struck out if it is made outside the stipulated 12 months from the date of seizure or delay.

A **Decision**

[9] Section 56(1) of the AMLA provides that:

> ...the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High
B Court for an order of forfeiture...

[10] Section 56(3) of the AMLA provides that:

> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of
C twelve months from the date of its seizure, be released to the person from whom it was seized.

[11] It must be noted that the permissive "may" is employed in sub-s. (1). However, my view is that the 12 months time stipulated in s. 56 of the AMLA is mandatory and not permissive. My reasons are
D as follows.

[12] Firstly it is obvious that the word "may" is used in the sense that it is up to the Public Prosecutor to apply for forfeiture. In other words, the use of the word "may" refers to the general discretionary
E power of the Public Prosecutor to proceed with forfeiture proceedings or to return the property. Assuming "may" is interpreted to mean that the Public Prosecutor has the discretion to make the forfeiture application 12 months after the seizure or the freezing order, the time stipulation would be rendered utterly meaningless.

F **[13]** The second reason is that the legislative aim of the prescribed time limit and a combined reading of sub-ss. (1) and (2) lead me to conclude that it is mandatory for the Public Prosecutor to make the application to forfeit within 12 months. The AMLA is a special law where property may be forfeited although a person may not have been
G convicted of any offence as long as the court is satisfied that it had been obtained as a result of or in connection with an offence under s. 4(1) or a terrorism financing offence. The burden of proof is the civil standard. The Public Prosecutor and the enforcement agency have wide powers to freeze bank accounts and seize property under the AMLA. It
H can be reasonably inferred that the aim of the time limit of 12 months in s. 56 is to provide a safeguard against the arbitrary use of the extensive powers granted by Parliament to the enforcement authorities and the Public Prosecutor. Without the time limit prescribed in s. 56, affected parties whose properties had been seized would be subject to the sweet will of the Public Prosecutor in awaiting the final outcome of
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forfeiture proceedings. Therefore, the time limit of 12 months should be construed strictly. Furthermore, sub-s. (3) clearly states that if no application is made within 12 months, the property shall be released to the person from whom it was seized. The use of the imperative "shall" in sub-s. (3) means that once the 12 months period has passed, the property must be released. In all the three cases before me, the 12 months period had lapsed on 18 August 2012. In the premises, the Public Prosecutor or the enforcement agency in question was obliged by law to return the property on that date. In the premises, the application in question which was made after that date is not competent. It is akin to closing the stable doors after the horse has bolted. For the same reason, it is also my view that the breach of the 12 months time period has deprived the court of the power to hear this application.

[14] In arriving at the above conclusion, I have not omitted to consider the authorities cited by learned DPP in respect of extension of time. However, I do not find them to be relevant. It is well known that numerous time stipulations govern the conduct of civil proceedings. However, provisions have been made in rules of court to specifically grant discretion to the court to extend time in suitable cases. As for the extension of time in respect of criminal appeals, the discretion to extend time is provided in s. 310 of the Criminal Procedure Code. Learned DPP submitted that s. 56 does not provide that an application for forfeiture should be struck out for non-compliance with the time stipulation. This argument has no merit. Since it is mandatory for the Public Prosecutor to make the application for forfeiture within 12 months, it is superfluous for Parliament to spell out the penalty for non-observance of the time stipulation. The more relevant question to ask is whether the AMLA provides for extension of time in respect the time stipulation in s. 56. As it does not provide for extension of time, in my view the court has no power to grant the same.

[15] Before I conclude, for sake of completeness, I must address a point that was raised by the DPP in respect of the date on which the application was made. The date of filing endorsed on the notice of motion in the three cases is 23 August 2012. This was not denied by the DPP. He also did not deny that the freezing orders or seizure orders in all the three cases were made more than 12 months before that date. However, he attempted to argue that he had emailed the application before 19 August 2012 to the court interpreter in Labuan. He then submitted that the application was made within 12 months. This submission is plainly without any merit. An application is made either by submission of hard copies of the cause papers at the court registry or submission of soft copies through the e-filing system of the court.

It is certainly not made through emailing copies to the court interpreter. One can only imagine the chaos that would result if emailing of cause papers to court interpreters is equated with proper filing at the Court Registry.

Conclusion

[16] For all the above reasons, I find that the delay in this case is fatal in that the court is deprived of the power to hear the application. I shall therefore dismiss the application of the DPP in all the three cases to forfeit the said properties. I also make a consequential order under s. 56(3) of AMLA to the effect that the properties in question must be returned to the respondents.